

## **Table of Contents**

Table of Authorities.....	2
Jurisdictional Statement.....	3
Statement of Facts.....	4
Points Relied On.....	5
Argument.....	7
Conclusion.....	16
Certificate of Compliance.....	18
Appendix.....	A-1

## **Table of Authorities**

**Cases:**

<i>In the Interest of D.J.W.</i> , 994 S.W. 2d 60.....	11, 12
<i>In the Interest of D.L.D.</i> , 701 S.W. 2d 152.....	7, 12, 13, 14
<i>Lambert v. Holbert</i> , 172 S.W.3d 894, 895 (Mo.App. 2005).....	7, 11, 13
<i>Roberts v. American Nat. Assur. Co.</i> , 212 S.W. 390.....	8, 9, 13
<i>State v. Weinstein</i> , 411 S.W. 2d 267.....	7, 8, 9, 10
<i>Transatlantic v. Falkenhainer</i> , 309 Mo. 224.....	8
<i>Worely v. Worley</i> , 19 S.W. 3d 127 (Mo.App. 200).....	13

**Statutes and Rules**

Supreme Court Rule 119.01.....	8, 10
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**Jurisdictional Statement**

The Appellant's appeal is from a judgment rendered by the Honorable James R.

Bickel, Circuit Judge of the Circuit Court of Dade County, Missouri, on a Motion for Relief from Judgment filed by Appellant, Craig Gresham. The Motion for Relief from Judgment arose out of a Judgment in the underlying juvenile case. An appeal of the Judgment Denying Motion for Relief from Judgment was originally heard and decided by the Missouri Court of Appeals, Southern District. This action was transferred to the Supreme Court by its own order dated June 30, 2006.

### **Statement of Facts**

The only additional facts that the Respondent wishes to be considered are as follows:

1. The Appellant had participated in the 72-hour hearing, a meeting held prior to

the adjudication hearing in accordance with Supreme Court Rule 119.01(b).

2. The Appellant made specific requests of the trial court when he filed his Petition for Writ of Habeas Corpus Ad Testificandum, Motion to Proceed in Forma Pauperis and Motion for the Appointment of Counsel. Furthermore, the Appellant attended and participated in virtually every hearing conducted during the course of the juvenile case without objecting to the trial court's jurisdiction.

#### **POINTS RELIED ON**

**I. The Appellant claims that the trial court erred in denying Appellant's Motion for Relief from Judgment because the trial court abused its discretion in failing to set aside the Finding of Jurisdiction and Order of Disposition in that the trial court**

**lacked jurisdiction to enter the underlying Finding of Jurisdiction and Order of Disposition since Appellant did not receive a Summons or a copy of the Petition as required by RSMo. § 211.101 and Supreme Court Rule 115.01(c) and 115.02**

*In the Interest of D.L.D.*, 701 S.W. 2d 152

*Roberts v. American Nat. Assur. Co.*, 212 S.W. 390

*State v. Weinstein*, 411 S.W. 2d 267

*Transatlantic v. Falkenhainer*, 309 Mo. 224

Supreme Court Rule 119.01(b)

**II. The Appellant claims that the trial court erred in denying Appellant's Motion for Relief from Judgment because the trial court abused its discretion in failing to set aside the Finding of Jurisdiction and Order of Disposition in that the trial court lacked jurisdiction to enter the underlying Finding of Jurisdiction and Order of Disposition since the actual notice of hearing received by Appellant was not reasonably calculated, under all circumstances, to apprise him of the pendency of the action and afford him an opportunity to present his objections.**

*In the Interest of D.J.W.*, 994 S.W. 2d 60

**III. The Appellant claims the trial court erred in denying Appellant's Motion for Relief from Judgment based on waiver because the trial court abused its discretion in failing to set aside the Finding of Jurisdiction and Order of Disposition in that juvenile cases present public policy reasons not to follow the general rule that**

**jurisdictional questions are deemed waived if not raised at the earliest opportunity.**

*D.L.D.*, 701 S.W.2d 152.

*Roberts v. American Nat. Assur. Co.*, 212 S.W. 390. (Mo.App. 1919).

*Worely v. Worley*, 19 S.W. 3d 127 (Mo.App. 200)

## **ARGUMENT**

**I. The Appellant claims that the trial court erred in denying Appellant's Motion for Relief from Judgment because the trial court abused its discretion in failing to set aside the Finding of Jurisdiction and Order of Disposition in that the trial court lacked jurisdiction to enter the underlying Finding of Jurisdiction and Order of**

**Disposition since Appellant did not receive a Summons or a copy of the Petition as required by RSMo. § 211.101 and Supreme Court Rule 115.01(c) and 115.02.**

Standard of Review-Point I

A judgment based on Rule 74.06(b) is reviewed for an abuse of discretion. *Lambert v. Holbert*, 172 S.W.3d 894, 895 (Mo.App. 2005). A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances before it and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Lambert*, 172 S.W.3d at 895. In a case involving Rule 74.06(b), an appellate court has the power to review questions of law de novo. *Lambert*, 172 S.W.3d at 895.

Argument-Point I

In order for the trial court to have jurisdiction over a parent in a juvenile case, the individual must properly be served or voluntarily appear. *In the Interest of D.L.D.*, 701 S.W. 2d 152. Any defect in service of process is cured upon the voluntary appearance of the individual subject to the defective service. *State v. Weinstein*, 411 S.W. 2d 267. A parent who voluntarily enters a juvenile case prior to its completion for any reason, other than to attack the lack of jurisdiction for improper service, waives his opportunity to attack jurisdiction in the future. *Id.*

When a juvenile case is started, it begins with a 72-hour meeting, followed by an adjudication hearing within 60 days, a dispositional hearing within 90 days and further hearings until a permanency plan is seen to fruition. Supreme Court Rule 119.01(b).

When a parent, whose service of process was defective, voluntarily becomes a party to this

process, he waives any dispute over the defective service. *State v. Weinstein*, 411 S.W. 2d 267. When service is defective, a parent may make a special appearance in order to attack jurisdiction. If the parent makes a general appearance, without first attacking jurisdiction, any defect in service that might have existed is now cured. *Id.*

“A general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the court’s jurisdiction over his person.” *Id.* The test for general appearance whereby jurisdiction is conferred over the person is “whether the defendant becomes an actor in the cause.” *Id.* The Court in *Transatlantic v.*

*Falkenhainer*, 309 Mo. 224, as cited in *State v. Weinstein*, stated that “...any action on the part of a defendant, except to object to the jurisdiction over his person which recognizes the case as in court, will constitute a general appearance.” *Id.* Furthermore, in *Roberts v. American Nat. Assur. Co.*, 212 S.W. 390, as cited in *State v. Weinstein*, the court stated that any step taken in court by a defendant “which involves, even by implication, a submission to, or an admission of, its power and authority to act in that case...without first questioning the jurisdiction...then the lack of jurisdiction on that account would doubtless be waived by such a course.” *Id.*

That court further stated that:

“if the complaint of lack of jurisdiction had been based on want of notice or defective or insufficient service, then no doubt the taking of depositions and the signing of a stipulation as to facts conceded would constitute a waiver of that



defect. Because such acts would necessarily imply that defendant was admitting that it had notice of the suit, and regardless of whether it had been properly served or not, it was proceeding as if service was regular. *Id.*

Finally, the court in *State v. Weinstein* summarized the effect that a general appearance has on defective service when it stated that “such general appearance cures any and all defects of service of process. *Id.*

The Appellant participated in the first step of a juvenile cause, the 72-hour hearing. Additionally, on November 19, 2002, the Appellant initiated a Petition For Writ of Habeas Corpus Ad Testificandum, Motion to Proceed in Forma Pauperis and Motion for Appointment of Counsel. (Appendix, A-2). When the Appellant initiated his Petition, asked the Court to proceed in Forma Pauperis and sought the appointment of counsel, he committed acts which sought specific grants or decisions from the Court. When the Appellant sought that relief, he recognized the case, and submitted to the jurisdiction of the court. *State v. Weinstein*, 411 S.W. 2d 267. When the Appellant filed the aforementioned requests, “he necessarily assume(d) the attitude that jurisdiction has been acquired, and having taken that position he is bound thereby, and will not be heard afterward to say otherwise. *Id.*

Nowhere in his documents does the Appellant deny the Court’s jurisdiction over his person. Furthermore, the Appellant’s own brief admits that he participated in various hearings in the juvenile case. The Appellant claims that the defective notice for the adjudication hearing, and failure of the Appellant to attend the hearing, is reversible error

on the part of the trial court. However, the Appellant attempts to separate the adjudication hearing into a completely separate trial, when in fact, the adjudication hearing is only one required part of an entire juvenile case. Supreme Court Rule 119.01(b). Once the Appellant submitted to any hearing during the course of the entire case, he waived any objection that he would have had to the defective service. If there was defective notice at the beginning of the juvenile case, that defect was cured by the Petition of the Appellant, request to proceed as a poor person and request for counsel. Furthermore, his attorney, upon appointment, did not seek to challenge the jurisdiction of the court. The remaining hearings were conducted with the Appellant and attorney present. (Appendix, A-3, 4, 5, 6 and 7). At that time, the defect in notice was cured and the Appellant lost the opportunity to raise the question of jurisdiction again.

Therefore, having failed to raise the question of jurisdiction upon his entry into the case, any defect in service upon the Appellant was cured, and the Appellant lost the opportunity to raise the question at a later time.

**II. The Appellant claims that the trial court erred in denying Appellant's Motion for Relief from Judgment because the trial court abused its discretion in failing to set aside the Finding of Jurisdiction and Order of Disposition in that the trial court lacked jurisdiction to enter the underlying Finding of Jurisdiction and Order of Disposition since the actual notice of hearing received by Appellant was not reasonably calculated, under all circumstances, to apprise him of the pendency of the action and afford him an opportunity to present his objections.**

### Standard of Review-Point II

A judgment based on Rule 74.06(b) is reviewed for an abuse of discretion. *Lambert v. Holbert*, 172 S.W.3d 894, 895 (Mo.App. 2005). A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances before it and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Lambert*, 172 S.W.3d at 895. In a case involving Rule 74.06(b), an appellate court has the power to review questions of law de novo. *Lambert*, 172 S.W.3d at 895.

### Argument-Point II

When a parent is entitled to notice, the notice received must be calculated under **all circumstances**, to apprise the interested party of the pendency of action and afford him an opportunity to present his objections. *In the Interest of D.J.W.*, 994 S.W. 2d 60 (emphasis added).

In the instant case, the Appellant was involved in the case from the 72-hour hearing and beyond. He was already involved with the Juvenile Office and Division of Social Services regarding two other children from a different mother that were already heavily into the juvenile process. He participated in as many aspects of this cause as possible from a jail cell, and the Juvenile Office made every attempt to accommodate his incarceration status. Finally, he attended numerous hearings during the course of the juvenile case and made affirmative requests of the court. If the applicable standard for a review of the notice given includes a review of **all circumstances**, then it can be said that the Appellant's initial involvement, prior loss of his other children, actual notice of the adjudication

hearing and ultimate participation in the juvenile process should be enough circumstance to provide adequate notice to the Appellant. *Id.*

Although Respondent contends that the notice provided, based on all circumstances, was reasonably calculated to apprise him of the pendency of the action and afford him an opportunity to present his objections, it becomes a moot point, since the Appellant voluntarily entered the juvenile case as argued in Point I.

**III. The Appellant claims the trial court erred in denying Appellant’s Motion for Relief from Judgment based on waiver because the trial court abused its discretion in failing to set aside the Finding of Jurisdiction and Order of Disposition in that juvenile cases present public policy reasons not to follow the general rule that jurisdictional questions are deemed waived if not raised at the earliest opportunity.**

Standard of Review-Point III

A judgment based on Rule 74.06(b) is reviewed for an abuse of discretion. *Lambert v. Holbert*, 172 S.W.3d 894, 895 (Mo.App. 2005). A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances before it and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Lambert*, 172 S.W.3d at 895. In a case involving Rule 74.06(b), an appellate court has the power to review questions of law de novo. *Lambert*, 172 S.W.3d at 895.

Argument-Point III

A court can only obtain jurisdiction over an party by service of process authorized by statute, rule or **appearance**. *Worely v. Worley*, 19 S.W. 3d 127 (Mo.App. 200). “The test

whether a defendant has made a general entry of appearance is whether he has become an actor in the cause.” *Roberts v. American Nat. Assur. Co.*, 212 S.W. 390. (Mo.App. 1919).

The Appellant has requested this Honorable Court to dissolve decades of jurisprudence in the name of public policy. In his effort to convince the Court that this is prudent, he attempts to distinguish two cases from *In the Interest of D.L.D.*, 701 S.W.2d 152.

However, the circumstances in these cases do not lend themselves to equal comparison. In *D.L.D.*, the parents never entered the juvenile case. *In the Interest of D.L.D.*, 701 S.W.2d 152. The father’s motion was filed with the Court, but his motion was never heard, never acted upon by the judge, and there is no record whether the judge even saw the motion. *Id.* This motion is only referred to in the docket sheet and “no disposition or further mention was ever made of this motion...” *Id.* at 155. The instant case most corresponds to those cases where there was active participation in the cause by the parent without first objecting to the jurisdiction of the Court.

The Appellant seeks a public policy exception to the long-standing general appearance rules. He claims that a parent can wrongfully have his parental rights terminated due to a procedural error, as opposed to actual wrong-doing. There is an inherent flaw in this reasoning though, in that if a parent makes a general appearance in a juvenile case he becomes an active participant. As an active participant, he has the ability to plead his cause before the Court. If he has an opportunity to plead his cause, he cannot have his parental rights terminated by a simple procedural error, since the Court’s decision would then be based upon not only the Division’s evidence, but the parent’s evidence as well. In

the instant case, the Appellant became an active participant, had an opportunity to present evidence to the Court and had ample opportunity to be heard. The rules of general appearance, while curing any defect in the service of process, did not take away from the Appellant's ability to offer evidence in support of his position.

The necessity of the rules of general appearance demands their affirmation by this Court. If a special exception to the rules of general appearance is made for juvenile cases, a parent could participate in virtually every aspect of a juvenile case, receive an adverse judgment, and then claim a lack of jurisdiction over his person. This is both unnecessary and impractical. The curing effect of a general appearance allows Courts to proceed despite initial jurisdictional issues. Additionally, allowing a parent, who hasn't been served properly, to participate without imputing to him a general appearance will bog down our circuit courts.

Therefore, having failed to raise the question of jurisdiction upon his entry into the case, any defect in service upon the Appellant was cured and the Appellant lost the opportunity to raise the question at a later time. Furthermore, as an active participant, the Appellant had every opportunity to state his case to the Court, thereby refuting his own argument that a public policy exception to the rules of general appearance is necessary to avoid the wrongful termination of a parent's rights.

## **CONCLUSION**

For the above-stated reasons, the Respondent, Dade County Juvenile Officer Jeanie Longstreath, respectfully submits to this Honorable Court that: (i) the trial court's judgment of jurisdiction and order of disposition was proper, since any defect in service was waived by the Appellant upon entering the juvenile case; (ii) the Appellant's attendance, via teleconference, of the 72-hour meeting, his prior experience with the same juvenile process and notice sent to him from the clerk gave him actual notice of the pending hearing based upon all of the circumstance when taken as a whole; and (iii) a public policy exception is unnecessary and impractical, since a parent who makes a general appearance is now an active participant and has every opportunity to present his cause to the Court.

Accordingly, the Respondent respectfully requests that the Court:

1. find that trial court did not err in entering it's judgment of jurisdiction and order of disposition in February of 2002, since any defect in service was cured by the Appellant's general appearance;

2. look at the circumstances surrounding notice received by the Appellant and determine that the notice was reasonably calculated, based upon all circumstances, to apprise him of the pendency of the action and afford him an opportunity to present his objections;

3. find that there should not be a public policy exception to the rules of general appearance, since the Appellant, after making a general appearance, had ample opportunity to present his case before the Court;

4. if there is error on the part of the trial court, that this Court find that said error was harmless error, since the Appellant voluntarily became a part of the process and thereby had every opportunity to participate and debate his fitness as a parent for the minor child;

5. uphold the judgment of the trial court and affirmation of the Missouri Court of Appeals, Southern District.

Respectfully Submitted,

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### **CERTIFICATE OF COMPLIANCE**

COMES NOW Brandon B. Fisher of the Vickers Law Firm, P.C., counsel for Respondent, Jeanie Longstreath, and states that Respondent's Substitute Brief filed this day with the Supreme Court of the State of Missouri:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 3557 words;
4. That the floppy disk submitted to the Court is virus-free; and
5. That one correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 24<sup>th</sup> day of August, 2006 to:

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## **APPENDIX**

Appendix Table of Contents.....	A-1
Copy of docket sheet for November 19, 2002, showing Appellant's affirmative requests made to trial court.....	A-2
Copy of docket sheet for January 27, 2003, showing Appellant's participation in Permanency Planning Hearing.....	A-3
Order of Permanency Planning, showing Appellant's attendance at said hearing.....	A-4
Copy of docket sheet for October 15, 2003, showing Appellant submitted a proposed home plan.....	A-5
Copy of docket sheet for November 3, 2003, showing Appellant's attendance of Permanency Planning Hearing.....	A-6
Copy of docket sheet for April 27, 2004, showing Appellant's participation in Permanency Planning Hearing.....	A-7

